IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 2:18-00215**

JAY JAMES FIELDS

MEMORANDUM OPINION AND ORDER

Pending before the court is defendant's motion to suppress evidence "obtained as a result of a stop made without reasonable suspicion." On March 5, 2019, the court conducted an evidentiary hearing on defendant's motion. For reasons expressed more fully below, the motion to suppress is **DENIED.** In support of its ruling, the court makes the following findings of fact and conclusions of law.

I. Findings of Fact

On the afternoon of November 3, 2017, the Logan County, West Virginia 911 Center received a call[1] that two "suspicious" people who might be carrying drugs were walking in the street on the Greenville Road area near Man, West Virginia. Government Exhibit 1. The caller gave his name to the 911 dispatcher

[1] The 911 dispatcher testified that the call came "in from the Greenville Road area in the vicinity of 671." Transcript of Pretrial Motions Hearing, March 5, 2019, at 16 (hereinafter "Tr. at ___.") (ECF No. 33)

during the phone call. See id. The 911 dispatcher testified that he did not know the caller. See Tr. at 18.

The caller described the two suspicious people as a white male with straggly hair, wearing a brown hoodie and blue jeans; and a white female with red hair wearing a pink sweater. The caller said the male had a bowie knife that was as long as his leg and also a pistol and the pair had left a residence known for drug activity in the Greenville Road area. The call was recorded, which is a routine practice. See Gov. Ex. 1; Tr. at 11-13.

Jamie Sparks, the Logan County 911 dispatcher took the call and promptly called the Logan County Sheriffs' department. The call was answered by Deputy Zachary Lilly who received the following message from dispatcher Sparks: "**got call from Greenville Road area, some suspicious individuals just left residence known for signal 24[2] activity, a white male subject wearing brown hoodie, and blue jeans, white female, red hair, pink sweater. Female and male last seen walking out of Greenville heading back toward Mann." Sparks did not mention the knife and gun reported by the caller.

[2] A "signal 24" is a code word used by law enforcement for illegal drug activity—including selling or possessing illegal drugs.

After taking the call, Deputy Lilly proceeded to the Greenville Road area to investigate. See Tr. at 33. Deputy Lilly testified that, in his opinion, the Greenville area was known for drug activity. See Tr. at 33. At approximately 3:30 p.m. he saw two people who fit the description made by the caller walking along the highway in front of Station Number 200 of the Logan County Fire Department, within 100 feet of Mann High School. Deputy Lilly pulled his vehicle off the road approximately 15 to 20 feet away from the two subjects and asked them to come towards him and off the roadway. See Tr. at 36-39. The man was defendant Fields and the woman was later identified as Kami Denice Walls. See Tr. at 34-35; ECF 18-1 at 8, 13-15. Fields did not comply and stepped out into the road further. Lilly also asked Fields his name and, in response, the defendant began to run away. Lilly testified that he did not raise his voice in asking these questions and spoke calmly. Lilly pursued Fields and grabbed the hood of his jacket. During this pursuit, Fields pulled out a gun. Once Lilly saw the gun, he backed off, drew his weapon, and commanded Fields to drop the gun. Fields escaped by letting his jacket be pulled off of his body and going into a nearby river. As he ran away, Fields threw the gun under Lilly's vehicle. The entire pursuit was recorded on the

fire department's video surveillance cameras. This video footage, as well as the two recorded telephone calls, were played for the court and admitted into evidence during the suppression hearing.

Deputy Lilly retrieved the gun from under his vehicle and returned to the area of the initial encounter, where Ms. Walls was waiting. She was read her Miranda rights and she then gave a statement. At that point, she identified herself as Kami Denice Walls. She said the gun was obtained for her by her boyfriend, Jay Fields. A criminal history check disclosed that Fields was a convicted felon. Fields was subsequently arrested and charged with being a felon in possession of a firearm.

The court found the testimony of all the witnesses testifying at the hearing to be entirely credible.

II. Conclusions of Law and Analysis

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The defendant bears the burden of demonstrating a Fourth Amendment violation, Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978), and, on appeal, the court reviews the evidence in the light most favorable to the party prevailing

below. United States v. Seidman, 156 F.3d 542, 547 (4th Cir. 1998). The factual findings underlying a motion to suppress, including credibility determinations, are reviewed for clear error, while the legal determinations are reviewed de novo. Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Murray, 65 F.3d 1161, 1169 (4th Cir. 1995); United States v. Rusher, 966 F.2d 868, 873 (4th Cir.), cert. denied, 506 U.S. 926 (1992).

Not every encounter between a private citizen and law enforcement implicates the Fourth Amendment. See United States v. Stover, 808 F.3d 991, 995 (4th Cir. 2015) ("[The Fourth Amendment], however, does not extend to all police-citizen encounters."); see also United States v. McCoy, 513 F.3d 405, 411 (4th Cir. 2008) ("Of course, the protections of the Fourth Amendment do not bear on every encounter between a police officer and a member of the public; it is only when a `search' or `seizure' has occurred that the Fourth Amendment comes into play."). As our appeals court has observed:

> The Supreme Court has recognized three distinct types of police-citizen interactions: (1) arrest, which must be supported by probable cause; (2) brief investigatory stops, which must be supported by reasonable suspicion; and (3) brief encounters between police and citizens, which require no objective justification.

United States v. Weaver, 282 F.3d 302, 309 (4th Cir. 2002) (internal citations omitted). At dispute in this case is whether Officer Lilly's initial interaction with defendant[3] fell into the second or third category.

Fields maintains that Deputy Lilly's encounter with him fell into the second category, i.e., a Terry stop. See ECF No. 19 at p.8 ("The Deputy Sheriff had already left his vehicle, approached Defendant, told him that he wanted to talk with him and ordered Mr. Fields to come stand at the end of his cruiser. This is a stop. And there was no reasonable suspicion to support the same."). In Terry v. Ohio, 392 U.S. 1, 30 (1968), the Supreme Court held that "an officer may, consistent with the

[3] Ordinarily, the initial step of any Fourth Amendment seizure analysis is "to determine whether a seizure took place and, if so, when the seizure occurred." United States v. Brown, 765 F.3d 278, 288 (3d Cir. 2014); see also United States v. Smith, Criminal No. 07-00119, 2008 WL 2329103, *3 (W.D. Pa. June 4, 2008) ("[B]efore proceeding to the Terry analysis, the Court must first determine when the officers seized Defendant Smith hence triggering the protections of the Fourth Amendment because the same is not implicated until a seizure occurs."). However, defendant's suppression motion rests entirely on his argument that Deputy Lilly's initial encounter with him rose to the level of a Terry stop. At the suppression hearing, counsel for defendant did argue in passing that the Fourth Amendment might be implicated even if defendant was found to be seized at some later point. However, no evidence was developed on this point nor was it argued by the parties. Therefore, this Memorandum Opinion and Order addresses defendant's argument regarding whether his initial encounter with Deputy Lilly was a seizure within the meaning of the Fourth Amendment.

Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123 (2000). The government, on the other hand, maintains that Deputy Lilly's initial encounter with Fields was not a Terry stop but, rather, fell into the third category noted above, i.e., a brief encounter. The government also contended there was never a seizure within the meaning of the 4th Amendment.

A. The Stop Viewed as a Brief Encounter

Of this third category—a "brief encounter"—our appeals court has observed that "[a]s a general matter, law enforcement officers do not seize individuals `merely by approaching [them] on the street or in other public places and putting questions to them.'" Stover, 808 F.3d at 995 (quoting United States v. Drayton, 536 U.S. 194, 200 (2002)); see also McCoy, 513 F.3d at 411 ("If all that is involved is the officer approaching a person, announcing that he is an officer, and asking if the person would be willing to answer some questions, then no reasonable suspicion is required because no `seizure' occurred. [. . .] Here, [the police officer] did not need an articulable suspicion to get out of his patrol vehicle, approach McCoy, inform McCoy that he was an officer, and ask to speak with him.

Although many members of the public might feel uncomfortable when an officer approaches them in this manner and asks to speak with them, uncomfortable does not equal unconstitutional.") (internal citations omitted). A person is "seized" within the meaning of the Fourth Amendment "only when, by means of physical force or a show of authority, his freedom of movement is restrained." United States v. Mendenhall, 446 U.S. 544, 553 (1980). The Stover court articulated how a court should determine when a seizure has occurred:

> [A]s the Supreme Court has explained, "[o]nly when the officer, by means of force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a `seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Where, as here, physical force is absent, a seizure requires both a "show of authority" from law enforcement officers and "submission to the assertion of authority" by the defendant. California v. Hodari D., 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) (emphasis omitted).

Stover, 808 F.3d at 995.

Defendant does not argue, nor is there any evidence, that Deputy Lilly applied physical force to him prior to his flight. Therefore, the court must determine: (1) whether, prior to defendant's flight, Deputy Lilly made a show of authority directed at defendant and, if so, (2) whether defendant submitted to it.

1. Deputy Lilly did not make a show of authority.

To determine whether law enforcement has displayed a show of authority sufficient to implicate the Fourth Amendment, courts apply the objective test set forth in Mendenhall, 446 U.S. at 554. Under this test, law enforcement has done so "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id. In making this determination, courts consider several factors including the activation of a siren or flashing lights, commanding a person to halt, displaying a weapon, and operating a vehicle in an aggressive manner to block a person's course. See, e.g., Michigan v. Chesternut, 486 U.S. 567, 575-76 (1998) (listing examples). "'The test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.'" Gardenhire v. Schubert, 205 F.3d 303, 313 (6th Cir.2000) (quoting California v. Hodari D., 499 U.S. 621, 628 (1991)).

The court finds that there was no show of authority in this case that would have made a reasonable person believe he was not free to leave. Deputy Lilly was in a police vehicle with no

flashing lights. He parked that vehicle approximately 15 to 20 feet from defendant. Upon exiting his vehicle, Deputy Lilly walked towards defendant and Walls, asked them to step out of the road and come towards him, and asked their names. When Fields failed to comply, Deputy Lilly repeated his request that defendant step toward his vehicle. Deputy Lilly spoke in a calm manner and never raised his voice. Fields was never threatened. Indeed, the entire interaction lasted no longer than approximately 10 to 15 seconds. Deputy Lilly's account of the duration of the encounter is corroborated by the videotape shown at the suppression hearing. Furthermore, Deputy Lilly's testimony is consistent with the police report he prepared on November 4, 2017. See ECF 18-1 at p.8. Walls's statement provided to law enforcement is also in line with Deputy Lilly's testimony. See ECF 18-1 at pp. 14-15 ("A deputy was coming from the opposite direction and pulled up on us beside the little league field. While the deputy was pulling up, Jay told me not to run. The deputy got out. He asked Jay what his name was. Jay took off running.").

Numerous courts have found the requisite show of authority to be lacking under similar circumstances. For example, in United States v. Lewis, the court found that the police officer

did not display a show of authority sufficient to implicate the Fourth Amendment. Crim. No. 4:17-cr-887-RBH, 2018 WL 827286, *3 (D.S.C. Feb. 12, 2018). The Lewis court explained:

> Applying the Mendenhall factors to this case compels a finding and conclusion that Defendant Lewis was not seized because a reasonable person under the circumstances would have felt free to leave and terminate the encounter with Sergeant Townsend. There was only one officer present at the scene. Although Sergeant Townsend was in uniform, he did not display his weapon. Sergeant Townsend did not touch Lewis or make any attempt, nor was he able, to block his departure prior to Lewis's flight. The language used by Sergeant Townsend was informal and non-threatening. "Hey man, let me talk to you for a minute." Sergeant Townsend asked Lewis to "come here" but Lewis did not comply, instead Lewis asked Sergeant Townsend "for what?" When Sergeant Townsend informed Lewis that he needed to see Lewis's identification and that there was a warrant for a "Lewis" subject, Lewis fled and terminated what, up until that point, had been a consensual police encounter.

Id.; see also United States v. Sullivan, No. 3:09-CR-28, 2010 WL 1257720, *5 (W.D. Ky. Mar. 26, 2010) ("The Court finds that there was no show of authority in this case that would have made a reasonable person believe he was not free to leave. The police officers, in plainclothes attire, were in a police vehicle with no flashing lights. The vehicle did not block Defendant's driveway. The officers approached Defendant at a walking pace. Their guns were holstered. Defendant was never threatened, nor is there evidence that the detectives spoke in

an authoritative tone of voice."); United States v. Rice, Criminal Action No. 2:09-68-DCR, 2009 WL 3711333, *1,3 (E.D. Ky. Nov. 4, 2009) (finding that "encounter was clearly consensual" where police officer "parked his marked patrol car along the street, exited the vehicle and stated in a loud voice, `Sir, may I talk to you for a minute.'"); United States v. Foster, 376 F.3d 577, 584 (6th Cir. 2004) (Defendant was not seized when police approached him on foot, asked him his name, what he was doing there, and if he had any form of identification.).

2. Fields Did Not Submit to the Alleged Show of Authority.

Even if the court determined that Deputy Lilly demonstrated a show of authority sufficient to implicate the Fourth Amendment, it is clear that Fields did not submit to that authority. According to the Stover court:

> [I]n cases where the individual does not clearly and immediately submit to police authority, courts must determine when and how the submission occurred. See, e.g., United States v. Lender, 985 F.2d 151, 153-55 (4th Cir. 1993). "[W]ithout actual submission" to the police, "there is at most an attempted seizure," which is not subject to Fourth Amendment protection. . . .
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> * * *
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> Hodari D. established the broad principle that an individual must submit to authority for a seizure to occur; Brendlin teaches that "passive acquiescence" is one form of that submission.

> . . . [D]etermining what constitutes "submission" can be a difficult, fact-intensive inquiry. "[W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." Brendlin, 551 U.S. at 262, 127 S. Ct. 2400; see also LaFave, 4 Search & Seizure § 9.4(d) (observing that "lower courts will frequently be confronted with difficult questions concerning precisely when the requisite physical seizure or submission to authority . . . occurs."). If an individual does submit to a show of police authority, and police then discover evidence, the court must assess whether either reasonable suspicion or probable cause supported the seizure. See Terry, 392 U.S. at 20-21, 88 S. Ct. 1868.

Stover at 996.

In the instant case, the court finds Fields did not submit to police authority. Deputy Lilly testified that Fields did not comply with any of his requests, i.e., Fields did not move out of the road and come towards Deputy Lilly nor did he tell Deputy Lilly his name. Indeed, defendant fled from Deputy Lilly almost immediately after the initial contact. Fields's actions up to and including his flight are the very definition of non-submission. See, e.g., Stover, 808 F.3d at 1000 ("[W]e cannot hold that walking away from police with a loaded gun in hand, in contravention of police orders, constitutes submission to police authority."); United States v. Valentine, 232 F.3d 350, 359 (3rd Cir. 2000) ("Even if Valentine paused for a few minutes and gave

his name, he did not submit in any realistic sense to the officers' show of authority, and therefore there was no seizure until Officer Woodard grabbed him."); United States v. Lender, 985 F.2d 151, 155 (4th Cir. 1993) ("We do not believe, however, that Lender's momentary halt on the sidewalk with his back to the officers constituted a yielding to their authority. [. . .] Defendant asks us to characterize as capitulation conduct that is fully consistent with preparation to whirl and shoot the officers."); see also United States v. Turner, 684. F. App'x 816, 819 (11th Cir. 2017) ("The record does not reflect that any of the men ran or refused to comply, thus they submitted to the show of authority by police officers.").

Therefore, because the court finds that Deputy Lilly's initial interaction with the defendant was a "brief encounter," the motion to suppress must be denied and the firearm admitted into evidence. Accordingly, the defendant's Motion to Suppress Evidence (ECF No. 18) is **denied**.

B. The Interaction Between Deputy Lilly and Defendant Viewed as a Terry Stop

The defendant supported his Motion to Suppress Evidence upon his argument that there was not reasonable suspicion to constitute a lawful Terry stop. See ECF No. 18. Thus, although the court finds that Deputy Lilly and the defendant's initial

interaction was merely a brief encounter, not triggering the protections of the 4th Amendment, the court finds it appropriate to discuss how the circumstances nevertheless presented reasonable suspicion to constitute a lawful Terry stop.

In its motion to suppress evidence of the pistol, the defendant argues that the encounter was a Terry stop that must be supported by reasonable suspicion. Defendant contends that there was insufficient evidence to support a finding of reasonable suspicion. The defendant relies primarily on cases involving anonymous tipsters. The court finds, however, that the defendant has inaccurately categorized the 911 caller as "anonymous." If the caller was anonymous, a finding of additional corroborating evidence would be required to satisfy a finding of reasonable suspicion. See, e.g., Florida v. J.L., 529 U.S. 266, 270 (2000).

The government made the following argument to support its contention that reasonable suspicion supported Deputy Lilly's stop of the defendant: the phone tip was not anonymous, the caller gave his name to the dispatcher; the description provided by the caller fit the appearance of the defendant and his companion; Lilly personally knew the area in question to be a high crime area known for illegal drug activity. Furthermore,

the government pointed out that the seizure of the gun did not occur until after the defendant pulled out the gun and dropped it; this occurred during the chase, not as a result of physical contact by Lilly with the defendant. See ECF No. 22.

As previously stated, a police officer may "stop and briefly detain a person for investigatory purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" Terry, 392 U.S. at 30. The Court determines the presence or absence of reasonable suspicion in light of the totality of the circumstances. United States v. Crittendon, 883 F.2d 326, 328 (4th Cir. 1989). The legitimacy of an investigative stop thus turns on what constitutes "reasonable suspicion," which the Fourth Circuit has called "a commonsensical proposition. [. . .] [properly] [c]rediting the practical experience of officers who observe on a daily basis what transpires on the street." United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993).

In Wardlow, 528 U.S. 119, the United States Supreme Court held that evidence of unprovoked flight supports reasonable suspicion for a Terry stop. In Wardlow, the defendant fled upon seeing a caravan of police vehicles converge on an area known for drug trafficking. Id. at 121. The officers pursued and

caught the defendant, conducted a pat-down search and discovered a handgun. Id. The Supreme Court held that the trial court properly denied the motion to suppress the handgun. Id.

"In cases where an informant's tip supplies part of the basis for reasonable suspicion, we must ensure that the tip possesses sufficient indicia of reliability." United States v. Perkins, 363 F.3d 317, 323 (4th Cir. 2004). "Where the informant is known . . ., an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion." Id. However, "[w]here a tip is anonymous, it must be accompanied by some corroborative element that establishes the tip's reliability. Id.

In United States v. Quarles, 330 F.3d 650 (4th Cir. 2003), an informant called 911 with information about possible illegal activity. Although he remained on the line, the caller did not identify himself by name to the 911 operator or to the investigating officers until the end of the call, after the Terry stop in that case had been conducted. Id. at 652. The Quarles court held that the call was not anonymous, because "[r]egardless of when the caller gave his name, the caller did identify himself to the dispatcher...." Id. at 655. The caller

also "stayed on the 911 line ..., watching the defendant and providing the dispatcher with on-going information regarding the defendant and even witnessing the police approaching the defendant." Id. The caller also gave personal information which "provided sufficient information to the police that he could have been held accountable for his statements." Id. at 656. Thus, the Quarles court found that "there was sufficient information given to accurately identify the caller," which "lends support to his credibility and reliability." Id. at 655.

The Fourth Circuit's subsequent decision in United States v. Elston, 479 F.3d 314, 318 n. 2 (4th Cir. 2007), expanded upon the factors in Quarles. The Elston court noted that "factors that can indicate the reliability of anonymous information" include whether the call "discloses the basis of the informant's knowledge," whether "the informant indicates that her report is based on her contemporaneous personal observation of the call's subject," and whether the informant "disclos[es] information that would enable authorities to identify her if they deem it necessary to do so." Elston, 479 F.3d at 318.

Here, as previously stated, the 911 caller provided his name to the dispatcher; however, the dispatcher did not provide the caller's name to Deputy Lilly. Additionally, the dispatcher

did not tell Deputy Lilly that the subjects had weapons on them.

In light of Quarles, the fact that the 911 dispatcher did not give Deputy Lilly the informant's name does not per se categorize the phone call as anonymous. See Quarles, 330 F.3d at 652. Furthermore, factors outlined by the Elston court to establish reliability are present: (1) the informant contemporaneously detailed the location and the appearance of the subjects while on the phone with the 911 dispatcher; and (2) the informant gave his name and the 911 dispatcher knew that the call came "in from the Greenville Road area in the vicinity of 671." Thus, the 911 caller "disclos[ed] information that would enable authorities to identify [him] if they deem it necessary to do so." Elston, 479 F.3d at 318.

Thus, even though the court's decision to deny the defendant's motion to suppress (ECF NO. 18) stands on separate and independent grounds, the court concludes that the tip is "sufficiently reliable to support reasonable suspicion." See, e.g., Perkins, 363 F.3d at 321. Therefore, even if the encounter is viewed as a Terry stop, the motion to suppress must be denied.

III. Conclusion

Based on the foregoing, the defendant's motion to suppress (ECF No. 18) is **DENIED.**

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record, to the United States Marshal for the Southern District of West Virginia, and to the Probation Office of this court.

IT IS SO ORDERED this 26th day of March, 2019.

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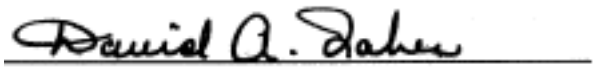

David A. Faber
Senior United States District Judge